Supreme Court, U.S.
FILED

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In The OFFICE OF THE CLERK

**Supreme Court of the United States**

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In re: Tony Falcon Leal Jr.

PETITIONER

On Petition For Mandamus
To The United States District Court
For the Western District of Texas
Austin Division

# PETITION FOR WRIT OF MANDAMUS

Tony Falcon Leal Jr., ***Pro Se***
UT Honors Graduate,
Graduate of William Mitchell
College of Law, St. Paul, MN

address and phone:
815 Louis Lynch
Corpus Christi, Texas 78408
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## *QUESTIONS PRESENTED*

Before this Court is a matter of grave importance involving an issue of first impression.

Under exceptional circumstances the Texas Attorney General's Office who is a party-litigant in this case was allowed to make an ***Amicus Curiae*** Motion, Friends of the Court, to dismiss the last remaining defendant in this case. The District Court's order is clearly erroneous as a matter of law.

In District Court Petitioner-Plaintiff has properly filed an unopposed motion to stay proceedings pending his writ of certiorari to this Court.. In his writ of certiorari Plaintiff presents this Court with the question of whether judicial disqualification decisions fall within the collateral order doctrine exception allowing appealability before a final decision as initially enunciated in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Moreover, on October 15, 2003 this Court received Petitioner's writ of certiorari and that same day District Judge Sam Sparks issues two orders; one granting Defendant's ***Amicus Curiae*** Motion and the other certifying the case as final.

This Court's appellate jurisdiction has been severely interfered with and adversely affected. By these actions Plaintiff has been forced to decide between appealing to the 5th Circuit Court of Appeals or continuing with his writ of certiorari. Rule 4 (a)(1) of Federal Rules of Appellate Procedure requires a notice of appeal within 30 days of final judgment.

If at this time Plaintiff appeals to the 5th Circuit the numerous erroneous decisions made in the lower court his writ of certiorari in this Court involving an issue of current judicial interest and importance will become moot. This legal position is not warranted since Plaintiff's has properly filed an unopposed motion to stay proceedings, the

Attorney General is a party-litigant and thereby cannot by definition file an ***Amicus Curiae*** motion and finally the individual who filed the ***Amicus Curiae*** motion is not "attorney-in-charge" of this case.

*Question Presented*

The issue before this Court is whether this Court is compelled to use the mechanism of mandamus to aid its jurisdiction by insuring and protecting the writing of writs of certiorari to this Court where as in the case at bar the Rule of Law allows Plaintiff an encumbered right to do so? I submit this Court is compelled to answer in the affirmative and thereby issue this writ.

*LIST OF PARTIES*

Petitioner, Tony Falcon Leal Jr., ***Pro Se***, is a graduate of William Mitchell College of Law in St. Paul, Minnesota; Alma Mater of the late Chief Justice Warren Earl Burger; Respondents are the following: University of Texas, UT Police Dept., Larry Faulkner, Pat Clubb, Jeffery Van Slyke, Sellers Bailey, Gonzalo M. Gonzales, and John D. Koehl.

## *TABLE OF CONTENTS*

*Questions for Review* ..... *i*

*Table of Contents* ..... *ii*

*Table of Cited Authorities* ..... *iii*

*Table of Appendices* ..... *iv*
*Opinions Below* ..... *1*
*Statement of Jurisdiction* ..... *1*
*Statutory Provisions Involved* ..... *1*
*Statement of the Case* ..... *1*
*Reasons for Granting the Writ* ..... *2*
*Conclusion* ..... *6*

# TABLE OF CITED AUTHORITIES

Cases:

*Johnson v. Jones*, 115 S. Ct. 2151 (1995).....5

*Puerto Rico Aqueduct & Sewer* .....5
*Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993)

*Will v. United States*, 389 U.S. 90, 96, 88 S. Ct. 269 (1967).
Statutes:.....4

Statutes:

28 U.S.C. section 1651 (a).....3

# TABLE OF APPENDICES

*Plaintiff's Motion to Stay Proceedings* .....1a

*Office of the Attorney General's Amicus Curiae Motion to Dismiss the University of Texas Police Department with Brief in Support* ..... *2a*

*Defendant's Notice of Designation of Attorney-In-Charge*.....2a-1

*Order Reassigning Case*..... 3a

*Order Granting Amicus Curiae Motion to Dismiss*..4a

*Judge's Final Judgment Order*.....4a-1

*Plaintiff's Motion to Reconsider*.....5a

*Reply to Plaintiff's Motion to Reconsider*.....7a

*Judge's Order Denying Plaintiff's Motion to Reconsider* .....8a

*OPINIONS BELOW*

District Judge Sam Spark's Order dated October 15, 2003 granting the Attorney General's ***Amicus Curiae*** motion is found in Appendix 4a. In addition, Judge Spark's denial of Plaintiff's ***Motion to Reconsider*** dated November 6, 2003 is reprinted in Appendix 8a.

*JURISDICTION*

The Court is authorized by 28 U.S.C. section 1651(a) to aid its jurisdiction by issuing the extraordinary writ of mandamus.

*STATUTORY PROVISIONS INVOLVED*

*28 U.S.C. section 1651(a)* authorizes the Court to issue an extraordinary writ which is not a matter of right but is sparingly exercised. To justify such a writ the petitioner must show the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

*28U.S.C. F.R.A.P. Rule 4 (a)(1)* requires in a civil case that a notice of appeal must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

*RELIEF SOUGHT*

Plaintiff prays that this Court postpone Judge Sam Spark's clearly erroneous decisions in granting Defendant's ***Amicus Curiae*** Motion and certifying this case as final

until this Court utilizing its jurisdiction has had an opportunity to decide Plaintiff's writ of certiorari.

*STATEMENT OF THE CASE*

On September 25, 2003 Plaintiff served on Defendants' counsel of record Mrs. Jo Ann Fine of the Texas Attorney General's Office Plaintiff's **Motion to Stay Proceeding** pending an writ of certiorari to this Court. This motion reprinted in Appendix 1a stands unopposed. On the same day, September 25, 2003, Ms. Celamaine Cunniff of the Attorney General's Office who has never been assigned to this case simultaneously serves two motions: **Notice of Designation of Attorney-in-Charge** and **Office of the Attorney General's *Amicus Curiae* Motion to Dismiss the University of Texas Police Department with Brief in Support**. (reprinted in Appendix 2a-1 and 2a, respectively )

Furthermore, on October 10, 2003 District Judge Lee Yeakel reassigns this case for reasons unknown to District Judge Sam Sparks. On October 15, 2003 Judge Sparks issues two orders: an order granting Ms. Celamaine Cunniff's ***Amicus Curiae*** Motion to Dismiss and an order certifying this case as final. (reprinted orders in Appendix, 4a, 4a-1) On the same day this Court receives Petitioner's writ of certiorari. (reprinted letter in attachment to 6a)

Plaintiff then files a **Motion to Reconsider** citing among other facts that Mrs. Jo Ann Fine is "attorney-in-charge" and Mr. Bruce Garcia is co-counsel of this case and that neither signed the motion to dismiss in violation of CV-7(a) and Rule AT-1. Ms. Celemaine Cunniff counters in her , **Response to Plaintiff's Motion to Reconsider,** by blatantly stating, "undersigned counsel became the Attorney-in-Charge of this case as of September 25, 2003". (both motions reprinted in Appendix 5a,6a) Finally, Plaintiff replies; however, the final order affirms that Ms.

Celamaine Cunniff is allowed to make the ***Amicus Curiae*** Motion to Dismiss. Appendix 8a

It is universally known that an ***Amicus Curiae*** motion, friends of the court, cannot be made by a party to the case.

*REASONS FOR GRANTING THIS WRIT*

To justify the granting of this writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that adequate relief cannot be obtained in any other forum or from any other court, and that exceptional circumstances warrant the exercise of the Court's discretionary powers. 28 U.S.C. section 1651(a)

*A. The Writ is in Aid of this Court's Appellate Jurisdiction.*

Its goes without saying that this Court has a vested interest in exercising its jurisdiction and hearing writs of certiorari. This Court is all too aware of its role in making vital legal decisions that alter the course of human existence in this nation; decisions based on cases brought to this Court by writs of certiorari.

In addition, it is clear factually that this Court's jurisdiction was properly invoked under 28 U.S.C. section 1254 (1) and that the lower court makes erroneous decisions as a matter of law. Those decisions places Plaintiff in the unwarranted position of deciding to proceed with his writ of certiorari or deciding to appeal to the 5th Circuit thereby severely interfering and adversely affecting this Court's proper jurisdiction.

Therefore, to aid in its jurisdiction this Court should allow this writ.

*B. Adequate Relief Can't be Obtained In Any Other Court*

On March 31, 2003 Plaintiff submits a notice of appeal appealing several of Chief Justice James R. Nowlin's March 10, 2003 orders dismissing all defendants, except one and another order issued on the same day which stayed all discovery on the only remaining defendant. In addition, Plaintiff appeals an earlier filed motion to recuse which Judge Nowlin denied on March 20, 2003. On July 8, 2003 the 5th Circuit denied Plaintiff's Petition for Rehearing stating a recusal motion is not an appealable collateral order.

Now, if Plaintiff appeals Judge Sam Spark's clearly erroneous orders of dismissal and finalization along with Judge James Nowlin's orders which Plaintiff submits are also erroneous then Plaintiff is appealing from final judgment under Rule 4 of the Federal Rules of Appellate Procedure. Plaintiff is no longer appealing a collateral order and his writ of certiorari submitted to this Court would become moot.

Moreover, if Plaintiff appeals only Judge Spark's clearly erroneous orders then Plaintiff loses the right of appeal to Judge Nowlin erroneous orders. Under Rule 4 of the F.R.C.P. that right becomes extinct 30 days after final judgment.

The fact of the matter is if Plaintiff appeals any or all of the erroneous orders he is procedurally appealing from final judgment and his certiorari to this Court is moot. Thereby, the 5th Circuit Court of Appeals is an inadequate court in the case at bar. No other forum is adequate or appropriate. Therefore, adequate relief cannot be obtained in any other forum or Court.

*C. Exceptional Circumstances Warrant Use of this Writ*

*I. Public confidence in the Judiciary*

This Court has repeatedly confirmed that appellate review should be postponed until after final judgment and

that extraordinary writs may not be used to thwart congressional policy against piecemeal appeals. See *Will v. United States*, 389 U.S. 90, 96, 88 S. Ct. 269 (1967). This case has been certified as final so there exits no such issue in the case at bar.

Moreover, there is an especially important factor at issue here; that being the public confidence in the impartiality of the judiciary. Similarly, this paramount factor has being alluded to in recent decisions involving the expansion of the collateral doctrine. See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) and *Johnson v. Jones*, 115 S. Ct. 2151 (1995) Public confidence is a fundamental concern of the federal judiciary and impartial justice must be provided both in appearance and in fact.

Clearly, under the facts of this case the granting of Defendant's *Amicus Curiae* Motion can be logically be seen as a complete failure of the system. Of course, we should not speculate as to Judge Spark's motivation; however, from the public's point of view injustice exists both in appearance and in fact.

Nevertheless, no matter how egregious the appearance or fact of partially of the order it may not still meet this Court's strict standards of mandamus. However, there exits additional critical special circumstances.

*II. Writ of Certiorari; Constitional Due Process Right*

This Court has a duty to defend the Constitution of these United States. When Plaintiff submits his Writ of Certiorari to this Court he is exercising his due process right guanreeted by the Constitution. Even though a small number of writs ever get heard that does not diminish in any way, shape, or form Plaintiff's fundamental right to do so.

For whatever reasons the lower court clearly obstructs Plaintiff's constitutional right to submit his writ and this Court has a duty set forth in the Constitution to intervene. Now it is known that writ of mandamus are heard on discretionary basis. However, I submit that once this matter comes to this Court's attention that it bound by its allegiance to the Constitution to act, to do otherwise would be to lessen the importance of the Constitution and the importance of this Court.

*CONCLUSION*

The lower court by its actions clearly violative of the Rule of Law obstructs Plaintiff fundamental due process rights. It has touch upon something held by the constitution to be sacred. Therefore, I submit this Court is compelled to take action and grant this writ.

*Respectfully submitted,*

Tony Falcon Leal Jr.

Tony Falcon Leal Jr., ***Pro Se***
815 Louis Lynch
Corpus Christi, Texas 78408
(361) 884-8950

# APPENDIX

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.**
Plaintiff
**v.** **Civil Action NO. A-02-CA-322JN**
**JURY**
**UNIVERSITY OF TEXAS AT AUSTIN**
**ET.AL,** Defendants

## MOTION TO STAY PROCEEDINGS

**Now Comes** Plaintiff, Tony Falcon Leal Jr., *Pro Se*, and files this **MOTION TO STAY PROCEEDINGS**. In support thereof the Plaintiff respectfully offers the followings:

Plaintiff is appealing to the U.S. supreme Court before Sept. 30, 2003 the 5th Circuit Court of Appeals refusal to hear Plaintiff's Appeal of Judge James Nowlin's denial of recusal motion.

Under the circumstances of this case the Supreme Court's exception allowing appealability before final judgment as initially enunciated in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221 (1949) is applicable.

I am therefore solemnly motioning that further proceedings in this case be stayed until the Supreme Court passes judgment on this fundamental due process issue.

Respectfully Submitted,

s/ Tony Falcon Leal Jr., ***Pro Se***

## CERTIFICATE OF SERVICE

I, Tony Falcon Leal Jr., ***Pro Se***, do hereby certify that a true and correct copy of the above and foregoing Plaintiff's **Motion to Stay Proceedings** has been served by placing same in the United States mail on this Sept. 25, 2003 addressed to:

Jo Ann Fine
P.O. Box 12548
Austin, Texas 78711-2548

s/ Tony Falcon Leal Jr., ***Pro Se***

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL,**
**Plaintiff**
**v.** **Civil Action No. A:02-CV-322-JN**
**JURY**
**UNIVERSITY OF TEXAS AT AUSTIN, ET.,** **Defendants.**

**OFFICE OF THE ATTORNEY GENERAL'S *AMICUS CURIAE* MOTION TO DISMISS THE UNIVERSITY OF TEXAS POLICE DEPARTMENT WITH BRIEF IN SUPPORT**

**TO THE HONORABLE JUDGE OF THE DISTRICT COURT:**

**NOW COMES** the Office of the Attorney General for the State of Texas, as Friend of the Court, and files this its *Amicus Curiae* Motion to Dismiss the University of Texas Police Department with Brief in Support in the above cause of action and in support thereof would show unto the Court the following:

**STATEMENT OF THE CASE**

Plaintiff Leal sued Defendants Dr. Larry Faulkner, Dr. Pat Clubb, Jeffery Van Slyke, Sellers Bailey, and The University of Texas at Austin alleging the following federal and state law claims: Fourth amendment civil rights violations brought under 42 U.S.C. section 1983, civil conspiracy, malicious prosecution, RICO violations, false arrest, slander, "prima facie tort, negligence, and gross negligence."

The Court has dismissed Defendants University of Texas, Faulkner, Clubb, Van Slyke, Gonzalez, Bailey, and

Koehl,. Docket Entry (DE) # 78, 80, 81, 82, and 95. Ostensibly the only remaining defendant is the University of Texas Police Department.

The University of Texas Police Department ("UT Police Department") was served in May of 2002. On June 5, 2002, defendants University of Texas at Austin, Dr. Larry Faulkner, Dr. Pat Clubb, and Jeffrey Van Slyke filed an answer. As the UT Police Department is not a separate legal entity an answer was not filed on its behalf.

On December 26, 2002, Plaintiff filed a Motion for Default Judgment against the University of Texas Police Department. DE # 48. On January 7, 2003, Counsel for Defendants University of Texas at Austin, Dr. Larry Faulkner, Dr. Pat Clubb, Jeffery Van Slyke, and Sellers Bailey filed a response to the motion for default judgment pointing out that the University of Texas Police Department is a nonexistent jural entity and has no independent capacity to be sued. DE # 49. On May 30, 2003, the Court denied Plaintiff's Motion for Default Judgment against the University of Texas Police Department. DE #93.

## *AMICUS CURIAE* MOTION TO DISMISS

The Office of the Attorney General for the State of Texas moves this Court to dismiss Plaintiff's lawsuit for failure to sate a claim upon which relief may be granted under Rule 12(b)(1). The University of Texas Police Department is a nonexistent jural entity and has no independent capacity to be sued. It is merely a subdivision of another legal entity. The UT Police Department is an entity of Defendant University of Texas at Austin, which is an agency of the State of Texas, and has no independent capacity to be sued.[1]

Accordingly to 51.203 of the Texas Education Code, the Board of Reagents have the authority to hire and commission peace officers as employees of each state institution of higher education. Therefore the Plaintiff was incorrect in carving out the University Police Department

as a separate legal entity. By analogy, if a plaintiff wants to sue the city police department, he must sue the city not the police department directly. See Darby v. Pasadena Police Dept., 939 F.2d 311 (5ht Cir. 1991). Therefore, any claim against the University of Texas Police Department is barred and should be dismissed under Rule 12(b)(1).

**CONCLUSION**

**ACCORDINGLY**, the office of the Attorney General, as *Amicus Curiae*, respectfully requests this Court to grant this motion to dismiss.

Respectfully submitted,
s/ Carol Bernster for Celamaine Cunniff

**CERTIFICATE OF SERVICE**

I, CELAMAINE CUNNIFF, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing **Office of the Attorney General's *Amicus Curiae* Motion to Dismiss the University of Texas Police Department with Brief in Support** has been served by placing same in the United States Mail on this 25th day of September, 2003, addressed to:
Mr. Tony Falcon Leal Jr., *PRO SE*
815 Louis Lynch
Corpus Christi, Texas 78408

s/ Carol Bernster for Celamaine Cunniff

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL,**
**Plaintiff**
**v.** **Civil Action No. A:02-CV-322-JN**
**JURY**
**UNIVERSITY OF TEXAS AT AUSTIN, ET.,** **Defendants.**

**NOTICE OF DESIGNATION OF ATTORNEY-IN-CHARGE**

**TO THE HONORABLE JUDGE OF SAID COURT:**

**COMES NOW** Celamaine Cunniff, Assistant Attorney General for the Office of the Attorney General of Texas, and files this Notice of Designation of Attorney-in-Charge. In support, the undersigned would respectfully show the Court the following:

I.

The above referenced cause of action has been internally reassigned within the Office of the Attorney General. The undersigned has been assigned to assume primary responsibility for this case in place of Jo Ann Fine, Assistant Attorney General.[1] This new Attorney-In-charge is familiar with the file and will comply with all scheduling orders. The undersigned further requests that all future documents in this matter be forwarded to Celamaine Cunniff, Assistant Attorney General, Law Enforcement Defense, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

[1] This is not substitution of counsel; counsel is and will remain the Attorney General of Texas.

Respectfully Submitted,
s/Carol Bernster for Celamaine Cunniff

**CERTIFICATE OF SERVICE**

I, CELAMAINE CUNNIFF, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing **Notice of Designation of Attorney-In-Charge** has been served by placing same in the United States Mail on this 25th day of September, 2003, addressed to:

Mr. Tony Falcon Leal Jr., *PRO SE*
815 Louis Lynch
Corpus Christi, Texas 78408

s/ Carol Bernster for Celamaine Cunniff

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.**
Plaintiff

**v.** **Civil Action NO. A-02-CA-322-LY**

**UNIVERSITY OF TEXAS,**
**UT POLICE DEPT., LARRY FAULKNER,**
**PAT CLUBB, JEFFREY VAN SLYKE, SELLERS**
**BAILEY, GONZALO M.. GONZALEZ, III, AND**
**JOHN D. KOEHL,** Defendants

**ORDER REASSIGNING CASE**

**IT IS ORDERED** that the above- styled and numbered cause is **REASSIGNED** to the Austin docket of the Honorable Sam Sparks for all purposes.

**SIGNED** this 10th day of October, 2003.

s/ Lee Yeakel
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.**
Plaintiff
**v.** **Civil Action NO. A-02-CA-322-LY**

**UNIVERSITY OF TEXAS,**
**UT POLICE DEPT., LARRY FAULKNER,**
**PAT CLUBB, JEFFREY VAN SLYKE, SELLERS**
**BAILEY, GONZALO M.. GONZALEZ, III, AND**
**JOHN D. KOEHL,** Defendants

**ORDER GRANTING THE OFFICE OF THE ATTORNEY GENERAL'S AMICUS CURIAE MOTION TO DISMISS THE UNIVERSITY OF TEXAS POLICE DEPARTMENT**

Now before the Court is the Office of the Attorney General's *Amicus Curiae* Motion to Dismiss The University of Texas Police Department (Clerk's Document No. 114). On March 10, 2003, the Court dismissed Plaintiff's claims against The University of Texas at Austin for lack of subject-matter jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), but did not explicitly dismiss Plaintiff's claims against The University of Texas Police Department, which Plaintiff named separately, The University of Texas Police Department is a subdivision of The University of Texas, see Tex. Educ. Code Ann. section 51.203 (West 1996); it is not a legal entity. Thus, Plaintiff's claims against The University of Texas Police Department, too must be dismissed for lack of subject-matter jurisdiction.

It is therefore **ORDERED** that the Office of the Attorney General's ***Amicus Curiae*** Motion to Dismiss The

University of Texas Police Department (Clerk's Document No. 114) is **GRANTED**.

All of Plaintiff's claims against The University of Texas Police Department are **DISMISSED WITH PREJUDICE**.

SIGNED this 15th day of October, 2003.

s/ Sam Sparks
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.**
Plaintiff

**v.** **Civil Action NO. A-02-CA-322-LY**

**UNIVERSITY OF TEXAS, UT POLICE DEPT., LARRY FAULKNER, PAT CLUBB, JEFFREY VAN SLYKE, SELLERS BAILEY, GONZALO M.. GONZALEZ, III, AND JOHN D. KOEHL,** Defendants

## FINAL JUDGMENT

Before the Court is the above-styled cause. On March 10, 2003, the Court dismissed all of Paintiff's claims against defendants Larry Faulkner, Pat Clubb, and Jeffery Van Slyke (Clerk's Document No. 78); Defendant The University of Texas at Austin (Clerk's Document No. 80); Defendant Gonzalo M. Gonzalez, III (Clerk's Document No. 81); and Defendant Sellers Bailey (Clerk's Document No.82). On May 30, 2003, the Court dismissed all of Plaintiff's claims against Defendant John D. Koehl (Clerk's Document No. 95). And on this date, the Court dismissed all of Plaintiff's claims against the only remaining defendant, The University of Texas Police Department. Accordingly, the Court enters the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

**IT IS HEREBY ORDERED** that all claims and causes of action brought by Plaintiff in this action are hereby **DISMISSED WITH PREJUDICE**.

**IT IS FURTHER ORDERED** that all relief not expressly granted is hereby **DENIED**.

**IT IS FINALLY ORDERED** that the case is hereby **CLOSED.**

**SIGNED THIS** 15th day of October, 2003.

s/ Sam Sparks
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.**
**Plaintiff**

**v.** **Civil action NO. A-02-CA-322JN**
**JURY**

**UNIVERSITY PF TEXAS AT AUSTIN**
**ET.AL.,** **Defendants**

**MOTION TO RECONSIDER ORDER GRANTING THE OFFICE OF THE ATTY GENERAL'S *AMICUS CURIAE* MOTION TO DISMISS THE UT POLICE DEPT. AND FINAL JUDGMENT**

**Now Comes** Plaintiff, Tony Falcon Leal Jr., ***Pro Se***, and files this **MOTION TO RECONSIDER**. In support thereof the Plaintiff respectfully offers the following:
TO JUDGE DAM SPARKS:

On October 10, 2003 you were assigned the above-styled and numbered cause and on October 15 you issued two orders which dismissed the last defendant, UT Police Dept., and ordered final judgment.

The two orders are inappropriate at this time because the initial motion to dismiss was brought by an individual who has neither been admitted to practice in this Court nor is "attorney in charge" of this case; CV-7 (a) and Rule AT-1 (f) violations have occurred. Jo Ann Fine is "attorney in charge" and Bruce Garcia is co-counsel and neither has signed the initial motion to dismiss.

In addition, Celmaine Cunniff, the individual who did sign the motion designated it as "***Amicus Curiae***". However, "***Amicus Curiae***" motions cannot be filed by

parties to the litigation. Celamaine Cunniff is a party litigant as evidenced by her simultaneously filed, "**Notice of Designation of Attorney-in Charge**" (9/25/03). In that latter document Celamine Cunniff states, "This new **Attorney-in Charge** is familiar with the file and will comply with all scheduling orders".

If she is familiar with this case as she said she was she noticed that the previous Judge, Judge Nowlin, appropriately denied the now Attorney-in-Charge, Jo Ann Fine, her motions to appear *Pro Hac Vice* and her motion to Substitute Counsel because co-counsel had not yet been assigned and she had not yet paid the *Pro Hac Vice* fee. If Celamaine Cunniff desires to be Attorney -in-Charge she must properly petition the Court and follow the required procedural steps. The Federal Rules of Procedure and the Rule of Law prohibit Celamaine Cunniff, at this time, from filing a motion; to rule otherwise would allow CV-7 (a) and Rule AT-1 to be circumvented and nullified.

Furthermore, on the same day, September 25, 2003, Plaintiff files his Motion to Stay Proceedings. That motion stands unopposed and should be granted. Moreover, on October 6, 2003 Plaintiff files his Writ of Certiorari to the Supreme Court of the United States. The writ concerns an issue which the Supreme Court has visited at least once a year for the last five years. It is an issue that is ripe for a decision. The issue is, "Whether judicial disqualification decisions fall within the collateral order doctrine exception allowing appealability before a final decision as initially enunciated in Cohen v. Beneficial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)". Therefore, the matter is of magnitude greater than the immediate party-litigants and their issues; the matter is one that concerns the evolution of law and the making of precedent.

Now, Celamaine Cunniff no doubt receives Plaintiff's motion to stay proceedings on September 25 and as stated her introductory letter to the District Clerk, William

Putnicki, she hand delivers a motion to dismiss a motion to dismiss to the clerk on the same day, the 25 of September. She knows she cannot file a motion to dismiss but files one anyway in an attempt to obstruct Plaintiff's right to petition the Supreme Court and file his Writ of Certiorari. Therefore, Judge Sparks if you allow her invalid motion to stand you aid her attempt to obstruct justice.

As it improperly stands now I have 30 days from the issuance of the final order to appeal to the Court of Appeals. If I do so the Writ of Certiorari to the Supreme Court will become moot and will not be considered even though it involves a matter of great legal magnitude. This legal position is not warranted since the defense has improperly made an invalid motion, which, in real terms, amounted to obstruction of justice. Therefore, I am prepared to petition the Supreme Court to resolve this issue; however, I am confident that is will not be necessary since it blatantly obvious that the defense had no authority to file the motion to dismiss in the first place.

Consequently, for the above-mentioned reasons the Court should revisit the issue in light of these facts and properly invalidate defense's motion to dismiss.

Respectfully Submitted.
s/ Tony Falcon Leal Jr., ***Pro Se***

**CERTIFICATE OF SERVICE**

I, Tony Falcon Leal Jr., ***Pro Se***, do hereby certify that a true and correct copy of the above and foregoing Plaintiff's **Motion to Reconsider** has been served by placing same in the United States mail on this Oct. 22, 2003, addressed to:
Jo Ann Fine
P.O. Box 12548
Austin, Texas 78711-2548

s/ Tony Falcon Leal Jr., ***Pro Se***

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY F. LEAL,**
**Plaintiff,**

**v.** **Civil Action No. A-CV-3222-JN**
**JURY**

**UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,**

**RESPONSE PLAINTIFF'S MOTION RECONSIDER**

**TO THE HONORABLE JUDGE OF SAID COURT:**

**COME NOW** Defendants University of Texas at Austin, Dr. Larry Faulkner, Dr. Pat Clubb, Jeffery Van Slyke, Gonzalo Gonzlaez, John Koehl, and Sellers Bailey by and through the Attorney General of Texas, and submit the following Response to Plaintiff's Motion to Reconsider Order Granting the Office of The Atty General's *Amicus Curiae* Motion to Dismiss the UT Police Dept. and Final Judgment. In support thereof, Defendants offer the following:

1. Plaintiff's Motion to Reconsider is frivolous and should be dismissed as such.

2. Undersigned counsel, Celemaine Cunniff, is not required to appear *Pro Hac Vice* before this Honorable Court as she is admitted to the Western District of Texas and has been since August 10, 1999.

3. Undersigned counsel became the Attorney-in-Charge of this case as of September 25, 2003. See Docket Entry 113. The attorney of record is and will remain the Office of the Attorney General.

4. As far as the underlying basis of Plaintiff's Writ of Certiorari is concerned, the Fifth Circuit denied Plaintiff's motion for rehearing as his contentions regarding a recusal motion were premature and not appealable under the collateral order doctrine. *See Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 85 & n. 3 (5th Cir. 1992). After speaking with a United States Supreme Court Docketing Clerk, Ms. Ruth Jones, Plaintiff's petition for writ was received on October 15, 2003, but not filed or docketed. The petition for writ was returned to the Plaintiff on October 21, 2003, as the petition did not conform to the rules of the Supreme Court. See letter attached.

5. As to Plaintiff's Motion to Stay, the mailing envelope bears a Corpus Christi postmark of September 25, 2003, which means it could not have been in Austin on September 25, 2003. As further proof, the envelope and its contents were stamped received by the OAG Public Information & Assistance Division on September29, 2003. The OAG Law Enforcement Defense Division received the Plaintiff's motion on September 30, 2003, as indicated by its date stamp. The earliest date that the undersigned could have been aware of Plaintiff's motion was September 30, 2003, five days after she filed the *Amicus Curiae* Motion to Dismiss. See photocopy of envelop attached.

6. Plaintiff has failed to bring forth any reason why the Order granting the *Amicus Curiae* Motion to Dismiss the University of Texas Police Department is not well-based in law.

7. Plaintiff's Motion to Reconsider is frivolous and seeks to delay the conclusion of this case.

WHEREFORE, PREMISES CONSIDERED, defendants respectfully pray this Court deny Plaintiff's motion to reconsider.

Respectfully submitted,

s/ Celamaine Cunniff

Assistant Attorney General

## CERTIFICATE OF SERVICE

I, CELAMAINE CUNNIFF, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing **Response to Motion to Reconsider** has been served by placing same in the United States Mail on this 27th day of October, 2003, addressed to:

Mr. Tony Falcon Leal Jr., *PRO SE*
815 Louis Lynch
Corpus Christi, Texas 78408

s/ Celamaine Cunniff
Assistant Attorney General

*attachment to Defendant's Motion, 6a

**SUPREME COURT OF THE UNTIED STATES**
**OFFICE OF THE CLERK**
**WASHINGTON, DC 20543-0001**

October 21, 2003

Tony F. Leal Jr.
815 Louis Lynch
Corpus Christi, TX 78408

RE: Tony Falcon Leal, Jr. v. University of Texas, et

Dear Mr. Leal:

Returned are 39 copies of the petition for a writ of certiorari in the above-entitled case postmarked on October 6, 2003 and received on October 15, 2003, which fails to comply with the Rules of this Court.

If you intend to pay the $300 docket fee, the petition must be in booklet format and on paper that measures 6 1/8 by 9 ¼ inches.

The cover of the petition should be white. Rule 33.1(g).

The text of the document must appear on both sides of the pages. Rule 33.1(b).

The questions presented for review must be followed by the list of parties (if all do not appear on the cover), corporate disclosure statement (if applicable), table of contents, table of authorities, citations of the official and unofficial reports of opinions and orders entered in the case, statement of the basis for jurisdiction, constitutional provisions, treaties, etc, etc., statement of the case, reasons for granting the writ, and the appendix. Rule 14.1.

The orders (s) of the U.S. District Court must be included in the appendix. Rule 14.1 (i). each order must be reproduced so that it complies with Rule 33.1.

Kindly correct the petition and appendix so that it complies in all respects with the Rules of the Court and return it to this office promptly so that it may be docketed. Unless the petition is received by this Office in corrected

form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5

This office shall retain one copy of the petition and your check in the amount of $300.00 in expectation of timely receipt of a properly prepared petition.

Enclosed are a copy of the Rules of the Court and memorandum concerning the preparation of a paid petition in booklet format.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
William K. Suter, Clerk
By:
Gail Johnson
(202) 479-3038

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.**
Plaintiff
**v.** **Civil Action NO. A-02-CA-322JN**
**JURY**
**UNIVERSITY OF TEXAS AT AUSTIN**
**ET.AL,** Defendants

**REPLY TO PLAINTIFF'S MOTION RECONSIDER**

**Now Comes** Plaintiff, Tony Falcon Leal Jr., ***Pro Se***, and files this **REPLY TO MOTION TO RECONSIDER**. In support thereof the Plaintiff respectfully offers the following:

**TO JUDGE SPARKS:**

Sir, it is time for you to stop this nonsense. On September 25, 2003 a Celamaine Cunnif files two documents, one entitled, **Office of Attorney General's Amicus Curiae Motion to Dismiss** and the other, **Notice of Designation of Attorney-In-Charge**. By definition a party-litigant cannot file an *Amicus Curiae* motion and by her own admission Celamaine Cunniff is a party-litigant. Therefore, Celamine is not authorized to file an *Amicus Curiae* Motion. It would be ludicrous to hold that she is authorized to file such a motion.

Jo Ann Fine has properly petitioned the court and is "attorney-in-charge" of this case. Bruce Garcia is co-counsel. Either one could have brought the "motion to dismiss" but they did not. Moreover, this Celamaine Cunniff now claims that she was "attorney-in-charge" on September 25, 2003 because she unilaterally files her "notice of designation" and that she had the right to

simultaneously file a "motion to dismiss") see item 3 on her **Response to Plaintiff's Motion To Reconsider**, (10/27/03). If she actually thought she had the right to file a "motion to dismiss" outright as "attorney-in-charge" on September 25, 203 why did she designate it as "***Amicus Curiae***", friends of the court. The fact is she knew that she could not file a "motion to dismiss' no matter how it was designated but she did it anyway to dissuade Plaintiff from filing his **Writ of Certiorari** to the Supreme Court.

Furthermore, her statement on item 3 on **Response to Plaintiff's Motion to Reconsider** is a material fraud upon the court and is subject to Rule 11 sanctions. Moreover, the first two documents filed by her she did not even sign. Finally, in all documents filed by her she fails to sign as "attorney-in-charge". Therefore, the Federal Rules of Procedure and the Rule of Law prohibit Celamaine Cunniff from filing a motion; to rule otherwise would be to allow CV-7 (a) and AT-1 (f) to be circumvented and nullified.

When I filed my **Motion to Reconsider** on Oct. 24, 2003 little was known of Celamaine Cunniff. She failed to disclose that she was admitted to the Western District of Texas in previous documents. By her obvious errors I logically thought she was unfamiliar with the Federal Rules of Civil Procedure and of the Local Rules. Now, by her admission it becomes abundantly clear that sinister intent is present here. She knew and knows that she had to and has to motion to "substitute counsel" in order for her to become "attorney in charge" of this case and she did not and has not done that.

Judge Sparks this case has been marred by corruption since its inception. No doubt there will be a Federal investigation of this case. Furthermore, a writ of mandamus has been prepared that will bring attention to the corruption present and no doubt this will add fuel to the fire. You, however, have an opportunity to do what the law requires. After all, no one in American Jurisprudence is

above the law; to do otherwise would be to bring disgrace upon yourself and the Federal Judiciary.

Respectfully Submitted,
s/ Tony Falcon Leal Jr., ***Pro Se***

**CERTIFICATE OF SERVICE**

I, Tony Falcon Leal Jr., ***Pro Se***, do hereby certify that a true and correct copy of the above and foregoing Plaintiff's **Reply to Motion to Reconsider** has been served by placing same in the United States mail on this Nov. 1, 22, 2003, addressed to:
Jo Ann Fine
P.O. Box 12548
Austin, Texas 78711-2548

s/ Tony Falcon Leal Jr., ***Pro Se***

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL., JR.,**
**Plaintiff,**

**-vs-** **Case No. A-02-CA-322-SS**

**UNIVERSITY OF TEXAS AT AUSTIN, THE UNIVERSITY OF TEXAS POLICE DEPT., LARRY FAULKNER, PAT CLUBB, JEFFREY VAN SLYKE, SELLERS BAILEY, GONZALO M. GONZALEZ, III and JOHN D. KOEHL,**
**Defendants.**

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**ORDER**

BE IT REMEMBERED ON THE 6TH DAY OF November 2003 the Court reviewed the file in the above-styled cause, and specifically the Plaintiff's Motion to Reconsider and the response and sur-response, and thereafter, enters the following:

IT IS ORDERED that the Plaintiff's Motion to Reconsider is DENIED.

SIGNED this the 6TH day of November 2003.

s/ Sam Sparks
UNITED STATES DISTRICT JUDGE